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No. 85-614

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

GRANVILLE B. TAYLOR, JR.,
Petitioner,

v.

LOCAL 980, UAW (UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA),
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION FOR UAW LOCAL 980

JORDAN ROSSEN
General Counsel
M. JAY WHITMAN
(Counsel of Record)
Associate General Counsel
8000 East Jefferson Ave.
Detroit, Michigan 48214
(313) 926-5216

PAUL GIBLIN
Garden State Bank Bldg.
170 Main Street
Hackensack, N.J. 07601
(201) 342-3500

Counsel for UAW Local 980

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COUNTERSTATEMENT OF QUESTION PRESENTED

Ford fails to recall Taylor in seniority order. The UAW grieves, arbitrates, and wins. The labor agreement, however, does not provide for back pay. The arbitrator, from Ford's comments at the hearing, believes there is agreement to award Taylor pension credits, and so directs. The Retirement Board, as fiduciaries of the Plan, refuse the credit. It is contrary to the Plan, and beyond the arbitrator's authority. Ford denies the comment was made. Asked to clarify, the arbitrator explains he was only repeating what he *thought* was an agreement. The UAW refuses to sue. Almost two (2) years later, Taylor brings a hybrid § 301-fair representation act.

Under *DelCostello v. Int'l Bro. Teamsters*, 462 U.S. 151 (1983), does the six-month statute of limitations of § 10(b) of the NLRA apply?

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Local 980 of the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW),[1] by counsel, respectfully pray that the Court *deny* the Petition for Writ of *Certiorari.*

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[1] Hereafter, the "Local" or "Local 980." The International Union, UAW, the parent organization, actually handled this matter during and after arbitration. Yet, it has *never* been a party to this litigation. Under the Ford-UAW NATIONAL AGREEMENT, the Local's jurisdiction over the grievance ends at Step 3, the *prior* Step. As the disposition below did not reach the merits, this peculiarity has so far escaped notice. Ford Motor Company, although originally a defendant, was granted summary judgment in 1981, and has not been a party since, making the array of parties even stranger.

OPINIONS BELOW

The opinion is reported at: *Taylor v. Ford & UAW Local 980*, 761 F.2d 931 (3d Cir. 1985), *affirming*, —— F.Supp. —— (D. N.J.), unreported, *on remand from*, *Taylor v. Ford & UAW Local 980*, 703 F.2d 738 (3d Cir. 1983), *reversing*, —— F.Supp. —— (D. N.J.), unreported. These decisions are reprinted in the Appendix to the Petition at 1a-83a.

COUNTERSTATEMENT OF THE CASE

Ford Motor Co. laid off Taylor on March 11, 1969, from the pumpman classification at the Metuchen, New Jersey plant. (78a)[2] Ford failed to notify Taylor of a vacancy in May, 1973, and instead filled it through a promotional posting, taken by a less senior worker. (80a)

This was discovered in May, 1976, when Taylor wrote Ford. Ford promptly told Taylor to report for work, and did so on June 28, 1976. (81a)

Taylor grieved this violation of the seniority provisions. Local 980 processed the grievance, and, not prevailing, appealed it to the International Union for possible arbitration. (81a)

On August 8, 1978, the Umpire[3] issued an Award holding Ford had violated the Agreement. Since Article VII § 24(a) of the Agreement specifically prohibits back pay for this sort of recall error, the Umpire could not grant back pay. (82a) However, on the subject of pension credit during the period, the Umpire wrote:

> During the Umpire hearing, the Company agreed that the Aggrieved should be credited with pension rights and benefits for the period from May 29, 1973, to date of reinstatement [June 28, 1976] and *based*

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[2] The Appendix to the Petition will be cited by the page of the Appendix, followed by "a," as "78a."

[3] Under the Ford-UAW NATIONAL AGREEMENT the standing arbitrator is known as the "Umpire." During these events it was Paul Hanlon. (81a-82a)

> *on that agreement*, the Umpire orders that this be done. [emphasis supplied] [4]

Taylor wrote inquiring about his pension benefits under this language. (84a) Ford responded by letter, denying there was any monetary award, and referring the pension issue to the Retirement Board of the Pension Plan.[5]

On October 25, 1978, the Retirement Board, as Plan fiduciaries, unanimously voted to deny Taylor's claim to retroactive credits:

> The Board Members concluded that implementation of the Umpire's decision would require changing the Ford Motor Company-UAW Retirement Plan, which is specifically prohibited under Article VII, Section 3 of the Plan, and further, that the Ford Motor Company-UAW Umpire *does not have jurisdiction over* matters concerning the Retirement Plan. [emphasis supplied] [6]

Mr. Caulford, the responsible International Representative, thereupon wrote the Umpire for clarification.[7] The Umpire responded, confirming Ford's version,[8] and denying any intent to award other benefits.[9]

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[4] The full arbitration decision is reprinted in the Appendix in the Third Circuit, at 17a-18a. It is Exhibit C to the Complaint.

[5] That letter, dated September 27, 1978, is Exhibit F to the Complaint, reproduced at 53a of the Appendix in the Third Circuit.

[6] *Reprinted* at 60a of the Appendix in the Third Circuit.

[7] Letter, Caulford to Hanlon, dated November 30, 1978, *reprinted* at 62a of the Appendix in the Third Circuit.

[8] Mr. Hanlon's letter is *reprinted* at 65a of the Appendix in the Third Circuit, and recited: "Based upon my notes and my recollection, I believe that at the close of the Umpire hearing, Vic Onufrieff [of Ford] stated that it was his understanding that the Aggrieved had already been credited with pension benefits for the relevant period of time, but if he had not been so credited, he would take steps to see that he would be."

[9] *Ibid.*, "There was definitely no intent to award other benefits such as hospital insurance, life insurance, accident and disability insurance and vacation and holiday pay."

On December 4, 1978, the Union wrote Taylor that it would take "no further action" in the matter.[10] Taylor abandoned his efforts at internal appeal, and, on November 9, 1980, "nearly two (2) years later,"[11] filed suit.

ARGUMENT

The Third Circuit characterizes the issue here as whether the six-month § 10(b) limitation from *DelCostello v. Int'l Bro. Teamsters*, 462 U.S. 151 (1983), "applies to a hybrid duty of fair representation-breach of contract action under section 301 . . . where the plaintiff-employee is seeking to enforce, rather than vacate, an arbitrator's decision." 761 F.2d at 932, 2a.

In reality, it's not even *that* interesting. When some care is taken to determine what the Umpire *actually* decided, it turns out that there is nothing for Taylor to be "seeking to enforce." The Umpire, perhaps disliking the contractual limitation on his remedy, picked up Ford's loose comment, and sensing benefit without cost, wrote it into his *dicta*. The UAW pressed into his narrow opening, only to be pointedly told, by the fiduciaries of the Retirement Board: (i) that the Plan granted no such benefit, and (ii) that the Umpire (and, for that matter, Ford's advocate) were beyond their jurisdiction to say otherwise. In this, the Retirement Board did their precise duty.

Recourse to the Umpire only confirmed Ford's, rather than Taylor's and the UAW's position. Since Mr. Hanlon had abandoned his wishful *dicta*, the UAW had no choice but to abandon the argument premised upon it. Taylor still wanted the pension credits, so he sued—a garden-variety hybrid case, attacking the Union's decision. However, he waited almost two years to do so.

This is an isolated, fact-specific case, whose only moral is that both employer advocates and arbitrators should be more circumspect in areas where they have no authority, and less knowledge.

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[10] 3a in the Pet. App., 761 F.2d at 932.

[11] 7a, 761 F.2d at 934, *i.e.*, December 4, 1978 to November 19, 1980, when the Complaint was filed.

It is a fine example of the wisdom of this Court's decisions in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), and *Schneider Moving & Storage Co. v. Robbins*, —— U.S. —— (1984), 104 S.Ct. 1844, 80 L.Ed. 2d 447. Those cases, in confirming the independent responsibilities of Plan fiduciaries, tell us exactly why the Umpire should have known better. To his credit, he saw his error.

Seen against *Amax Coal* and *Robbins*, Taylor's complaint amounts to only a pedestrian, hybrid, fair-representation case, contesting the UAW's abandonment of a lost cause. As such, it falls easily within the purpose and policies of *DelCostello*.

There is no serious split of the Circuits. The Court below, 5a note 2, 761 F.2d at 933 n. 2, is correct in distinguishing *Derwin v. Gen. Dynamics Corp.*, 719 F.2d 484 (1st Cir. 1982), and *IUE v. Ingram Mfg. Co.*, 715 F.2d 886 (5th Cir. 1983), *cert. denied*, —— U.S. —— (1984), 104 S.Ct. 1711, 80 L.Ed 2d 184. Those cases involve the Union's agreement with the employee, and suit against the Company to enforce the arbitration award. Here, the UAW disagreed with Taylor, and refused to sue Ford.

Had the UAW decided to sue, *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), would have given us a longer statute of limitations. But the UAW did not.[12] We have here not the Union's suit against the Company on the award; but an employee's hybrid suit against the Union's decision. As such it is controlled by *DelCostello*, as this Court below correctly held.

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[12] Had Taylor, as a Plan participant, sued the Retirement Plan *itself*, under § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), he might also have benefited by the longer statute of § 413, 29 U.S.C. § 1113. On the Plan's status as the entity to be sued for a benefit entitlement, *see* § 502(d), 29 U.S.C. § 1132(d). For some reason unknown to us, Taylor never sued ERISA. The Petition, at 19, frankly admits that the pension credits are the only remedy at issue here.

The "retroactivity" of *DelCostello* has been the subject of much followup litigation in the Circuits, as this Court knows. We need not repeat the citations here.[13] There is no particular disagreement on this issue. Because of this, and because the issue will shortly pass from our jurisprudence, there is no need for the Court to resurrect it.

CONCLUSION

This case is fact-specific, atypical, and correctly decided. There is no split in the Circuits, and the retroactivity issue is transitional. For these reasons, the Court should *deny* the Petition.

Respectfully submitted,

JORDAN ROSSEN
General Counsel
M. JAY WHITMAN
(Counsel of Record)
Associate General Counsel
8000 East Jefferson Ave.
Detroit, Michigan 48214
(313) 926-5216

PAUL GIBLIN
Garden State Bank Bldg.
170 Main Street
Hackensack, N.J. 07601
(201) 342-3500

Counsel for UAW Local 980

December 26, 1985

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[13] They are recited in the Petition, at 40-42.